Supreme Court, U. S.
FILED
OCT 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 79-461

WATERBURY URBAN RENEWAL AGENCY,
Petitioner

vs.

WATERBURY ACTION TO CONSERVE OUR HERITAGE INC., ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix B

EDITOR'S NOTE

Pages 1 + 2 were missing at time of filming. If, and when obtained, a corrected fiche will be forwarded to you.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H78-539

WATCH (Waterbury Action to Conserve Our Heritage Incorporated)

—vs—

PATRICIA ROBERTS HARRIS, individually and as Secretary, United States Department of Housing and Urban Development; EDWARD T. MARTIN, Regional Administrator, Region 1, United States Department of Housing and Urban Development; LAWRENCE THOMPSON, Area Director, United States Department of Housing and Urban Development; WATERBURY URBAN RENEWAL AGENCY.

RULING ON MOTION FOR PRELIMINARY INJUNCTION

The plaintiff has moved for a preliminary injunction to restrain the defendants from proceeding with an urban renewal project in the City of Waterbury. The plaintiff claims that the defendants have failed to comply with the procedures mandated by the National Historic Preservation Act of 1966, 16 U.S.C. § 470 **et seq.** ("NHPA"), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 **et seq.** ("NEPA"). The Court finds that the plaintiff is likely to prevail on its claim that the defendants have failed to comply with the statutory mandates of NEPA, but that it is unlikely to prevail on its NHPA claim. The Court thus concludes that the plaintiff has made an adequate showing of probable success on the merits of the action and irreparable injury; accordingly, the plaintiff's motion for a preliminary injunction is granted.

Jurisdiction

This Court has subject matter jurisdiction over this controversy pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Absent " 'clear and convincing evidence' " of a contrary legislative intent, said Act renders federal agency action reviewable by a federal district court. **Abbot Laboratories v. Gardner,** 387 U.S. 136, 141 (1967); **Citizens Committee for the Hudson Valley v. Volpe,** 425 F.2d 97, 101 (2d Cir. 1970), **cert. den.** 400 U.S. 949 (1970). Neither the NHPA nor NEPA affirmatively precludes judicial review, and this Court will therefore follow those courts which have relied upon the Administrative Procedure Act as a basis for subject matter jurisdiction, where a federal agency's action is alleged to be in conflict with the statutory provisions of NHPA or NEPA. **See, e.g., Committee to Save the South Green v. Hills,** Civil No. H-76-328 (D. Conn. Nov. 5, 1976); **Save the Courthouse Committee v. Lynn, 408 F.Supp. 1323, 1331 (S.D.N.Y. 1975);** Scherr **v. Volpe,** 336 F.Supp. 882, 884-85 (W.D. Wisconsin 1971), **aff'd** 466 F.2d 1027 (7th Cir. 1972).

Jurisdiction also exists under 28 U.S.C. § 1331(a). The issues involved — the applicability of federal statutes and regulations — clearly present federal questions. With respect to the $10,000 jurisdictional amount, it is difficult, if not impossible, to assign a precise value to the plaintiff's interest in the preservation of structures of purported cultural and historical significance. In an analagous situation the Supreme Court declared:

> "The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331(a)." **Illinois v. City of Milwaukee,** 406 U.S. 91, 98 (1972).

That same analysis applies here. **See Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra.**

Statement of Facts

The plaintiff, Waterbury Action to Conserve Our Heritage, Inc., is a nonstock corporation organized and existing under the laws of the State of Connecticut. Most of the members of the organization reside, are employed or own real property in Waterbury, Connecticut. The stated purpose of the organization is the promotion of historic and cultural preservation programs in the City of Waterbury. The defendants include three officials of the United States Department of Housing and Urban Development, who are responsible for executing the federal urban renewal and planning laws with respect to the project which is the subject of this action. These three defendants — Patricia Roberts Harris, Secretary of the Department, Edward T. Martin, Regional Administrator of the Department's Region 1, and Lawrence Thompson, the Department's Area Director for the Connecticut Area — will be referred to in this opinion as "HUD." The fourth defendant is the Waterbury Urban Renewal Agency ("the agency"), which is entrusted with implementing the urban renewal project at the local level.

In 1971 the City of Waterbury adopted an Urban Renewal Plan, known as the Central Business District Renewal Project No. Conn. R-107 ("the plan"), which envisioned the rehabilitation of 20.6 acres in downtown Waterbury. Said plan called for the demolition of 83 of the 113 buildings situated in the project area. Demolition commenced in 1971, and called for the construction of high rise, high density commercial and office space. As of the date of the hearing on the present motion, 56 buildings had been demolished. Twenty seven additional buildings remain to be demolished, according to the plan.[1]

On May 11, 1973, the local agency entered into a Loan and Capital Grant Contract with HUD, which provided for loans aggregating $12,844,451.00 and a grant of $11,544,451.00 from HUD to the agency for the purpose of implementing the plan.

Discussion of the Law

Standing.

The question before this Court at the present time is not whether any buildings within the project area are deserving of preservation; that decision is reserved to the informed discretion of the appropriate government agencies. Rather, the critical issue is whether the manner in which the government agencies exercised their discretion conformed with the requirements of federal law.

Before reaching that issue, however, the Court must address two threshold issues: (1) whether the plaintiff has standing and (2) whether the plaintiff is barred by laches. The defendants have conceded that the plaintiff has standing to maintain this action. Other courts in this Circuit have previously concluded that plaintiffs who live, work or own property in the area of an urban renewal project do meet the two fold "injury in fact" and "zone of interests" standing test enunciated in **Association of Data Processing Service Organizations, Inc. v. Camp,** 397 U.S. 150 (1970). **See Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra.** The Court therefore finds that the present plaintiff does have standing to maintain this suit.

Laches.

The defendants further contend that the equitable doctrine of laches should bar this suit. They note that the project was initially approved by the city's Board of Aldermen in October of 1971, after a public hearing on the project. Additionally, when HUD published the "Hanly" notice on January 5, 1977, requesting that any comments relative to the project be made prior to January 20, 1977, no adverse comments were received. Members of the plaintiff organization expressed no concern over the project until December 27, 1977. At that time Mr. and Mrs. Lorry Yelding requested that HUD determine whether any buildings within the project area were eligible for inclusion on the National Register of Historic Places. The defendants contend that this sequence of events clearly demon-

strates that the members of the plaintiff organization have slept on their rights, and that it would be unfair to enjoin further demolition at this time, in light of the fact that 56 buildings have already been demolished.

The courts have stated time and again that laches will not ordinarily bar an action which is brought to enforce environmental legislation. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1333; **City of Rochester v. United States Postal Service,** 541 F.2d 967, 977 (2d Cir. 1976); **Jones v. Lynn,** 477 F.2d 885, 892 (1st Cir. 1973). One reason for relaxing the traditional laches rules in environmental cases is that citizens are entitled to assume that government officials will follow the procedures mandated by the law.[2] As Judge Friendly has noted:

> "The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary responsibility under the Act rests with the Agency." **City of New York v. United States,** 337 F.Supp. 150, 160 (E.D. N.Y. 1972) (three judge court).

That the plaintiff's delay, in and of itself, is not sufficient to bar suit is demonstrated by **Save the Courthouse Committee v. Lynn, supra.** In that case demolition of the courthouse was first considered in 1954 and the actual plan calling for demolition was approved in 1965. The court enjoined the demolition when suit was brought in 1975, in spite of the fact that the plaintiff had raised no objection to the project until 1974, nine years after the plan had been approved. This ruling was based on the principle that, in view of the strong public interest in effecting compliance with environmental legislation, "the primary question is not how much earlier plaintiffs should have sued, but whether injunctive relief pending compliance would still serve the public interest and the purposes of the Act." **Steubing v. Brinegar,** 511 F.2d 489, 495 (2d Cir. 1975).

In the context of the present case, it is true that 56 buildings have already been torn down and destroyed; however,

the purposes of NEPA would still be served by enjoining further demolition pending a properly conducted determination of whether the remaining 27 buildings merit preservation. This is not a situation where construction has proceeded to the point where it would be economically impractical to alter the original plan. **Compare City of Rochester v. United States Postal Service,** 541 F.2d 967, 977 (2d Cir. 1976), (where the court was "reluctantly forced to conclude" that laches would bar suit where the post office in question was 35% completed). The present case is more akin to **Committee to Save the South Green v. Hills, supra,** where the court enjoined further work on a highway, in spite of the fact that construction had already commenced, because the historical structure in question was still standing. This Court, recognizing that 27 buildings remain intact at the present time, concludes that laches is no bar to this suit.

Applicability of NHPA.

The National Historic Preservation Act of 1966 provides federal support for the preservation of the nation's historic landmarks. To accomplish this goal, the Act sets up the National Register of Historic Places and establishes an Advisory Council on Historic Preservation. Section 470f of the Act directs the head of any federal agency, which has jurisdiction over a proposed federally-assisted project, to consider the effect of any such project on any structure or object that is listed in the National Register. Additionally the federal agency head is to provide the Advisory Council on Historic Preservation an opportunity to comment on any such project.

The defendants do not dispute the allegation that they have not complied with the procedures mandated by NHPA. Rather they contend that the Act is not applicable to this case. To understand this argument, it is necessary to trace the development of § 470f. On May 11, 1973, the date the Loan and Capital Grant Contract was executed by HUD and the agency, that section read, in pertinent part:

> "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking, . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register . . . "

In 1976 the section was amended to insert the words "or eligible for inclusion in" following "included in." The effect of this change was to expand the scope of the Act's coverage, so that federal agency heads must now take into consideration not only buildings which are **included in** the National Register, but also those which are **eligible for inclusion.**

The parties agree that at the time the Loan and Capital Grant Contract was executed, no buildings within the project area were listed in the National Register. Thus, the Act imposed no duties on HUD as of that time. However, on February 7, 1978 the Keeper of the National Register determined that the H.H. Peck Carriage House, which is located within the project area, was eligible for inclusion in the National Register. Additionally on March 22, 1978 John Shannahan, the State Historic Preservation Officer, sent a letter to Lawrence Thompson, Area Director of HUD, in which he expressed the belief that several portions of the project area are Register eligible. The question to be decided therefore is whether the 1976 amendment to § 470f imposes any present duties on HUD, in light to these new circumstances.

The courts have determined that the cut off date for determining compliance with the NHPA, in the context of urban renewal projects, is the date the Loan and Capital Grant Contract is executed. This conclusion is based on the language of the statute, which requires that any determination regarding NHPA protected property is to be made "prior to the approval of the expenditure of any federal funds on the undertaking." The courts have universally held that the "approval of the expenditure" of federal funds occurs when the Loan and Capital Grant Contract is signed. **Committee to Save the**

South Green v. Hills, supra: Save the Courthouse Committee v. Lynn, supra, 408 F.Supp. at 1335; **Kent County Council for Historic Preservation v. Romney,** 304 F.Supp. 885, 888 (W.D. Mich. 1969); **St. Joseph Historical Society v. Land Clearance for Redevelopment Authority,** 366 F.Supp. 605, 609 (W.D. Mo. 1973); **South Hill Neighborhood Association v. Romney,** 421 F.2d 454, 462 (6th Cir. 1969), **cert. den.** 397 U.S. 1025 (1970).

Based on this interpretation of the statutory language, the courts have held that NHPA does not impose any new duties on federal agency heads, even when circumstances change after the signing of the Loan and Capital Grant Contract. Thus, under the pre-1976 law, NHPA was held inapplicable to a project if no buildings were listed in the National Register at the time of signing the Loan and Capital Grant Contract, in spite of the fact that buildings within the project area were subsequently listed in the National Register. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn,** 408 F.Supp. at 1336; **South Hill Neighborhood Association v. Romney, supra,** 421 F.2d at 462; **Hart v. Denver Urban Renewal Authority,** 551 F.2d 1178, 1180 (10th Cir. 1977). Although no case has addressed the precise issue involved here, logic dictates that the same result should obtain in the present case. Whether there is a change in circumstances or a change in the law, the final cut off date for determining compliance with the NHPA is still the date of execution of the Loan and Capital Grant Contract. Since the Act imposed no duties on HUD at that time, there is no duty to comply with the Act now.

The plaintiff contends that even though the provisions of the Act themselves do not mandate compliance, the administrative regulations promulgated under the Act do. On May 15, 1971 the President promulgated Executive Order No. 11,593, in order to implement the goals and policies of the NHPA. Section 1(3) of the Order directs federal agencies to adopt procedures "to assure that Federal plans and programs contribute to the preservation and enhancement" of the nation's historic and cultural resources. Rather than enacting its own

regulations, HUD merely incorporated by reference the guidelines which had been published by the Advisory Council. **See** HUD Handbook of Departmental Policies 1390.1 (38 Fed. Reg. 19182, 19185).

The Advisory Council Guidelines, which are collected at 36 C.F.R. § 800, differ from NHPA in two important respects. First, even prior to the 1976 amendment to § 470f, the Guidelines directed that the federal agency consider the effect of any proposed undertaking on properties "that are included in **or eligible for inclusion** in the National Register." 36 C.F.R. § 800.4 (emphasis supplied). Second, the Guidelines mandate continuing compliance with the Act, even after the date of signing the Loan and Capital Grant Contract, as long as the federal agency retains any authority to make changes in the project which could alter its impact on historical and cultural properties. 36 C.F.R. § 800.3(c) and (g).

These Guidelines are inapplicable here for two reasons. First, the regulations did not require the federal agency to consider properties which are eligible for inclusion in the National Register until January 25, 1974, and the final date for determining compliance with NHPA was May 11, 1973; thus the adoption of this regulation subsequent to that date has no applicability in this case. Second, even if the regulation were in effect as of the date of signing the Loan and Capital Grant Contract, the regulation is invalid. It is axiomatic that "regulations, in order to be valid, must be consistent with the statute under which they are promulgated." **United States v. Larinoff,** 431 U.S. 864, 873 (1977). A regulation which creates "a rule out of harmony with the statute, is a mere nullity." **Manhattan General Equip. Co. v. Commissioner,** 297 U.S. 129, 134 (1936). To the extent that the Advisory Council Guidelines expand the scope of the statute to include properties which are **eligible for inclusion** in the National Register and extend the cut off date for determining compliance beyond the date of signing the Loan and Capital Grant Contract, they are inconsistent with the statute and are therefore invalid.[8]

Applicability of NEPA.

The National Environmental Policy Act of 1969 has as its goal the restoration and maintenance of the natural environment. The principal mechanism for achieving this goal is contained in 42 U.S.C. § 4332(2) which provides in pertinent part:

> "(2) all agencies of the Federal Government shall —
>
> . . . .
>
> (c) include in every recommendation or report on proposals for legislation or other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> . . . .
>
> (ii) alternatives to the proposed action.
>
> . . . .
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved . . . . "

Thus the core of NEPA is the environmental impact statement in which the federal agency, prior to initiating any major action which could significantly alter the environment, assesses the effect which the proposed action will have on the environment, including a discussion of alternatives which could minimize that effect.

NEPA complements NHPA insofar as it expressly extends its procedural protections to the nation's historic and cultural resources:

> "in order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, . . . to the end that the Nation may—
>
> . . . .
>
> (4) preserve important historic, cultural, and natural heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." 42 U.S.C. § 4331.

The courts have construed this language to require the filing of an environmental impact statement if the proposed urban renewal project contemplates the destruction of properties listed in the National Register. **Committee to Save the South Green, supra; Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

No environmental impact statement was ever prepared by HUD in the present case. HUD claims that an environmental impact statement is not necessary, because it made a "threshold determination" that the project will not significantly affect the environment. The finding of no significant environmental impact was made in a Special Environmental Clearance Report dated January 28, 1977. Therefore Philip Forzley, the Area Environmental Clearance Officer who prepared the report, could not have taken into consideration either the February 7, 1978 determination that the H.H. Peck Carriage House is eligible for inclusion in the National Register or the March 22, 1978 letter of the State Historic Preservation Officer stating his opinion that several other portions of the project area are eligible for inclusion in the National Register.

In contrast to NHPA, NEPA provides no set cut off date for determining whether compliance must be had. Rather, it requires compliance with its procedures at the time "any major Federal action" is taken. 42 U.S.C. § 4332. The courts have construed this language to mean that NEPA must be complied with as long as the federal agency retains significant control over the project. **Save the Courthouse Committee v.**

Lynn, supra, 408 F.Supp. at 1340; **Monroe County Conservation Council, Inc. v. Volpe,** 472 F.2d 693, 699 (2d Cir. 1972); **Jones v. Lynn, supra,** 477 F.2d at 889. In the context of urban renewal contracts, it has been held that HUD retains significant control over the project even after the signing of the Loan and Capital Grant Contract. The contract by its terms envisions continuing federal responsibility for the undertaking. Thus § 108 of Part II of the Loan and Capital Grant Contract requires the local agency to submit all proposed actions throughout the life of the contract to the Secretary of HUD for approval. Specifically, the Contract requires HUD approval of the acquisition or demolition of any property. The granting of such approval by the Secretary of HUD has been held to constitute "major federal action" within the meaning of 42 U.S.C. § 4332. Consequently the Secretary must comply with NEPA each time approval to proceed with a new aspect of the project is given. **Committee to Save the South Green v. Hills, supra; Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1340; **Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

HUD's recognition of its continuing responsibility for the present project is manifested in the freeze of the project which was ordered by HUD in January 1978, after questions were raised with respect to the historical value of buildings within the project area. HUD lifted this freeze on August 31, 1978, without conducting a further environmental review in light of the February 7, 1978 determination that the H.H. Peck Carriage House is eligible for inclusion in the National Register and the March 22, 1978 letter of the State Historic Preservation Officer in which he stated his opinion that several portions of the project area are Register eligible. Since NEPA envisions continuing compliance for so long as the federal agency has significant control over the project, the failure of HUD to make a new assessment of environmental consequences in light of this new information constitutes a violation of the Act. **See Committee to Save the South Green v. Hills, supra; Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182.

The plaintiff, in order to prevail on a motion for preliminary injunction, does not have to prove that any structures are actually listed in the National Register at the time the injunction is sought. Thus in **Boston Waterfront Residents Association, Inc. v. Romney,** 343 F.Supp. 89 (D. Mass. 1972), a preliminary injunction was granted when it was shown that HUD had filed no environmental impact statement in spite of the fact that certain buildings within the project area had been "proposed for listing" in the National Register. Similarly, in **Aluli v. Brown,** 437 F.Supp. 602 (D. Hawaii 1977), the court enjoyed the Navy's use of Kahoolawe Island for target practice after a showing that archeological teams had discovered within the target area 89 archeological sites "which they believe meet the criteria for placement on the National Register." 437 F.Supp. at 608. In the latter case the Navy had orginally filed an environmental impact statement in 1972, at which time no archeological sites had been uncovered. The court ruled that, even though the initial environmental impact statement was proper, the NEPA's continuing duty of compliance required the Navy to make a new environmental impact statement once the new information was brought to its attention.

The conclusion that HUD must consider new evidence as it is made available should come as no surprise to the present defendants. The Special Environmental Clearance Report, in which NEPA was determined inapplicable to the R-107 project, concluded as follows:

> "This finding of Inapplicability shall be updated by addendum upon receipt of additional information having significant implications for environmental impact and not previously considered. A new finding shall then be required."

Moreover, in his letter of January 18, 1978 to Frank Davino, executive director of the Waterbury Urban Renewal Agency, in which the freeze was imposed, Daniel Kolesar, another HUD official, expressly acknowledged HUD's continuing duty of compliance with NEPA. (Plaintiff's Exhibit 4).

Upon being informed in February and March, 1978, by the Keeper of the National Register and the State Historic Preservation Officer, that structures within the project area may be eligible for inclusion in the National Register, HUD should have conducted a new "threshold determination" as to whether an environmental impact statement was required in light of this new information, before proceeding further with the project. If, as a result of this threshold determination, HUD decided that properties which were in fact Register eligible, would be affected by the project, then a detailed environmental impact statement would be required. **Hart v. Denver Urban Renewal Authority, supra,** 551 F.2d at 1182; **Committee to Save the South Green v. Hills, supra: Boston Waterfront Residents Association, Inc. v. Romny, supra** 343 F.Supp. at 90; **Aluli v. Brown, supra,** 437 F.Supp. at 606-07. Prior to making this threshold determination HUD must provide the public with an opportunity for a hearing and notice of such a hearing must be published. **Hanly v. Kleindienst,** 471 F.2d 823, 836 (2d Cir. 1972), **cert. den.** 412 U.S. 908 (1973). If HUD determines that none of the structures which are claimed to have historical value are in fact Register eligible or that they will not be adversely affected, then it must give sound reasons for that determination. **City of Rochester v. United States Postal Service, supra,** 541 F.2d at 973. Even in a threshold determination, the federal agency must provide an adequate record so that its finding of inapplicability of NEPA can be subjected to judicial review; "perfunctory and conclusory language simply does not suffice . . . " **Hanly v. Mitchell,** 460 F.2d 640, 647 (2d Cir. 1972), **cert. den. sub nom Hanly v. Kleindienst,** 409 U.S. 990 (1972). Finally, this threshold determination must consider possible alternatives to the project. **Hanly v. Kleindienst, supra,** 471 F.2d at 834-35.

Standard for Preliminary Injunction.

The prevailing standard for determining when a preliminary injunction should issue is set out in **Sonesta International Hotels Corp. v. Wellington Associates,** 483 F.2d 247 (2d Cir. 1973):

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits **and** possible irreparable injury, **or** (2) sufficiently serious questions going to the merits to make them a fair ground of litigation **and** a balance of hardships tipping decidedly toward the party requesting the preliminary relief." **Id.** at 250 (emphasis in original).

From the discussion above, it is clear that the plaintiff has made a showing of probable success on the merits with respect to the allegation that HUD has not complied with their duties under the NEPA. Upon receipt of the information that structures within the project area were Register eligible, HUD should have conducted a new threshold determination as to whether an environmental impact statement was then required. It has been held that the failure of a federal agency to comply with NEPA is ordinarily in and of itself sufficient to justify preliminary injunctive relief. **City of Rochester v. United States Post Office,** 541 F.2d 967, 977 (2d Cir. 1976). The irreparable injury which would ensue if the injunction did not issue is obvious. The act of demolition is irreversible; once a building is razed, there will be no opportunity to assess its historical significance, nor will there be any possibility of considering alternatives to demolition. **See Save the Courthouse Committee v. Lynn, supra,** 408 F.Supp. at 1343.

HUD argues that the delay that will attend the issuance of the injunction will increase construction costs for the project and that certain developers already under contract may withdraw from the project if the plan is substantially altered. Similar claims in other cases have been held insufficient to warrant denial of preliminary relief. Courts have concluded that delay is not sufficient to outweigh the plaintiff's irreparable injury and the public's interest in securing compliance with NEPA. **Committee to Save the South Green v. Hills, supra; Citizens Defense Fund v. Gallagher,** No. Cv.-78-63-Bu (D. Montana Nov. 3, 1978). In **Save the Courthouse Committee v. Lynn, supra,** the injunction issued in spite of the defendants' claim that they would be damaged to the extent of one million dollars. As the Second Circuit has noted, compliance with

NEPA necessitates delay and its concomitant price increases, but Congress has deemed that preservation of the environment is worth that cost. **Steubing v. Brinegar, supra,** 511 F.2d at 497.

Security for Costs.

Rule 65(c), Fed. R. Civ. P., provides that the court, upon the issuance of a preliminary injunction, shall require a bond, in an amount which it deems appropriate, to cover costs incurred by any party who is wrongfully enjoined. The courts have held that a nominal bond is appropriate in environmental cases. **I-291 Why? Association v. Burns,** 372 F.Supp. 223, 264 (D. Conn. 1974), **aff'd** 517 F.2d 1077 (2d Cir. 1975) ($100 bond required); **Committee to Save the South Green v. Hills, supra** (no bond required); **Sierra Club v. Froehlke,** 359 F.Supp. 1289, 1385 (C.D. Cal. 1973) ($100 bond required). Accordingly an injunction will issue upon the filing of a $100 bond by the plaintiff.

Conclusion

While the plaintiff has failed to demonstrate a likelihood of success that the defendants have violated NHPA, it has shown a probability of success on its claim that HUD has failed to comply with NEPA. The fact that structures which are eligible for inclusion on the National Register are scheduled for demolition constitutes irreparable injury. Therefore a preliminary injunction will enter in favor of the plaintiff, restraining HUD and the local agency from proceeding further with this urban renewal project, until there has been a final hearing on the merits.[4]

The foregoing opinion shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated at Hartford, Connecticut, this 22nd day of December, 1978.

T. Emmet Clarie
Chief Judge

FOOTNOTES

[1]/ The record is not clear as to the precise number of buildings which are scheduled for demolition under the plan. The defendant alleges that it is 83, while the plaintiff claims it is 104. Similarly, there is a dispute over the number of buildings which remain to be demolished at the present time. The defendant claims it is 27 and the plaintiff alleges it is 24. Since the same principles of law would apply irrespective of which numbers are used, the Court finds it unnecessary to resolve this issue of fact.

[2]/ The facts of the present case indicate that at least a portion of the delay in bringing suit was due to the plaintiff's reliance on government officials performing their duties in the appropriate manner. In response to the Yeldings' letter of December 27, 1977, HUD ordered a "freeze" on the project pending consideration of the historical value of the buildings within the project area. The freeze was lifted on August 31, 1978 and demolition recommenced on September 10, 1978. The plaintiff filed suit on October 12, 1978.

[3]/ Although both **Committee to Save the South Green v. Hills** and **Save the Courthouse Committee v. Lynn, supra,** applied the regulations which this Court now holds to be invalid, neither case is directly apposite here. In both cases the properties in question were either listed in or nominated to the National Register. By contrast, no properties within the project area in the present case have been listed in or nominated to the National Register. More importantly, it is clear from reading those two cases that the disparities between the statute and the regulations were never brought to the courts' attention; thus the courts never considered whether the regulations were valid.

It should be noted that, in light of the 1976 amendment to § 470f, the regulation's expansion of coverage to include properties which are eligible for inclusion in the National Register is no longer objectionable, as applied to projects where the Loan and Capital Grant Contract is executed subsequent to the effective date of the amendment. However, the provision which requires a continuing duty of compliance with NHPA is still inconsistent with the statute.

[4]/ There is no doubt that an injunction may issue against a local agency which has become a "partner" of the federal government in the implementation of a project. **Biderman v. Morton,** 497 F.2d 1141, 1147 (2d Cir. 1974); **Proetta v. Dent,** 484 F.2d 1146, 1148 (2d Cir. 1973).